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# Supreme Court of the United States,

OCTOBER TERM, 1906.

No. 201.

THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY, et al., *Appellants*,

*vs.*

THE INTERSTATE COMMERCE COMMISSION.

**Appeal from the Circuit Court of the United States for the Southern District of Ohio.**

## BRIEF FOR THE APPELLANTS.

THE BARCLAY PRINTING CO., Strobridge Building, 108-118 W. Canal St., Cincinnati, O.

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### STATEMENT OF THE CASE.

The Interstate Commerce Commission, in a proceeding commenced before it on February 24, 1900, by the Procter & Gamble Company against the appellants, made an order, on May 14, 1903, requiring the defendants on or before June 15, 1903, to cease and desist from charging for the transportation of common or laundry soap in less than car load quantities rates equal to 20 per cent. below the rates fixed for the transportation of articles designated as third class in their established freight classification, known as the Official Classification. R. 83. This suit was instituted by

In this brief and in the record the abbreviations C. L. and L. C. L. are frequently used to indicate car load and less than car load shipments.

the Commission in the circuit court on July 20, 1904, to enforce that order, and the appeal is from a decree in favor of the Commission.

The pleadings in the case before the Commission and its opinion and order are annexed to the petition in the circuit court as exhibits.

The case was heard in the circuit court on the evidence before the Commission and on additional evidence taken by the defendants, directed principally to showing the extra cost incident to handling and transporting freight in less than car loads. It established conclusively that the extra charge made by them for that service was less than the cost of the service. The complainant took no additional testimony.

In the defendants' Official Classification, referred to in the order of the Commission, all traffic is divided into six principal classes, numbered from 1 to 6, the rates decreasing as the number of the class increases and being therefore highest on class 1 and lowest on class 6. The first general classification known as Official Classification No. 1 was adopted about the time the act to regulate commerce went into effect. Up to 1900 nineteen Official Classifications had been issued. In all those issued since 1891 soap of all kinds C. L. was put in class 6 and L. C. L. in class 4. Official Classification No. 20 issued in December, 1899, to become effective January 1, 1900, raised soap C. L. from class 6 to class 5, and soap L. C. L. from class 4 to class 3. By an amendment of Official Classification No. 20 made on March 10, 1900, within a month after the Procter & Gamble Company filed their complaint before the Interstate Commerce Commission, soap L. C. L. was reduced from class 3 to 20 per cent. less than class 3, and since that date all soap C. L. has been and is in class 5, and all soap L. C. L. in 20 per cent. below class 3.

The complaint of the Procter & Gamble Company sought to compel the defendants to put common soap C. L. in class

6 and L. C. L. in class 4. The Commission held that common soap C. L. was properly in class 5 and refused to order its change to class 6, but that common soap L. C. L. should be in class 4, and they ordered it taken out of the intermediate class in which the railroads had put it, to-wit 20 per cent. less than class 3.

The effect of this order, if enforced now, would be to disturb the relation which has existed for sixteen years between car load and less than car load rates on common soap, and to compel the railroads to perform the service incident to handling and transporting soap in less than car load lots for less than the actual cost of the service.

The rates on the various classes between Cincinnati and Chicago and between Cincinnati and St. Louis are as follows: third class 25 cents per 100 pounds; 20 per cent. less than third class 20 cents; fourth class 17 cents; fifth class 15 cents; sixth class 12 cents. The decision of the Commission therefore is that 15 cents (fifth class) is a reasonable rate for common soap C. L. between Cincinnati and Chicago and between Cincinnati and St. Louis, but that 20 cents (third class less 20 per cent.) is unreasonable for the same thing L. C. L., and that it should be 17 cents. If the railroads were to conform to the order of the Commission they would receive only 2 cents more per hundred pounds for carrying common soap L. C. L. between Cincinnati and Chicago, than for carrying it C. L., although the testimony shows that the extra cost of depot handling alone is about 5 cents, to which must be added the extra cost of transportation which is a still greater percentage of the C. L. rate.

## ASSIGNMENT OF ERRORS.

1. The order of the Interstate Commerce Commission was not a lawful order.

2. It was not warranted by the complaint filed before the

Commission, and ignored its express admissions as to the proper relation between soap in car loads and less than car loads.

3. The classification of common soap in less than car loads at 20 per cent. below third class does not result in an unjust or unreasonable charge for the service rendered, or subject the traffic to any undue or unreasonable prejudice or disadvantage. These were the only violations of the act to regulate commerce charged in the complaint of the Procter & Gamble Company.

4. If common soap in car loads is properly in fifth class, as the Commission has held, common soap in less than car loads is entitled to be put in 20 per cent. below third class.

5. The uncontradicted evidence before the circuit court showed conclusively that the extra charge made for carrying soap in less than car loads is below the actual cost of the service.

6. The court erred in holding that the classification of soap in less than car loads should not be based on its relation to soap in car loads. No such issue was raised. The very opposite claim was expressly made in the complaint before the Commission.

7. But if the classification of soap in less than car loads, ought to be based upon its relation to other articles in less than car loads, and not upon its relation to soap in car loads, no violation of the act to regulate commerce is shown by putting it in 20 per cent. below third class.

## ARGUMENT.

### I.

**No issue was raised as to the proper relation between common soap in car loads and less than car loads. The petition of the Procter & Gamble Company alleged that they should be classified with reference to each other, and what the difference should be.**

The circuit court held that "the classification of soap for carriage in less than car load lots should be based upon its relation to other articles for carriage in less than car load lots, and not upon its relation to soap for carriage in car load lots" (R. 1091). But that was not the claim of the petition of the Procter & Gamble Company.

This suit is based upon the order of the Commission, and that in turn is founded upon the complaint of the Procter & Gamble Company. We turn therefore to that complaint to ascertain what alleged violations of the act to regulate commerce the defendants were called upon to answer, for it must be conceded that the Commission could not lawfully find them guilty of violations of the act with which they were not charged, and that they were not called upon to prove facts that were admitted in the complaint. Section 13 of the act provides for the filing of a petition before the Commission by any person claiming that the act has been violated, "which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular

violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

The allegations of the petition of the Procter & Gamble Company with respect to soap in car loads are not material, except as they bear upon the charges made with respect to soap in less than car loads, because the Commission dismissed the petition as to car load rates and classification. But the decision of the Commission that common soap in car loads was properly in fifth class, and that fifth class rates were reasonable, is important. That finding, taken in connection with the allegations of the petition as to the commercial relation between soap in car loads and soap in less than car loads, and the proper difference in rates between the two, and in connection with the uncontradicted evidence before the circuit court as to the extra service and cost of handling soap in less than car load lots, required a decision that soap in less than car loads was properly in the class where the railroads had put it, and that the rates were reasonable.

The petition admitted that the difference in rates between fourth class and sixth class, which is the precise difference between 20 per cent. less than third class and fifth class, was the proper allowance for the carriage of common soap in less than car loads. It alleged that the difference between class 3 (where soap L. C. L. was originaally placed in Classification No. 20) and class 5 was "very much greater than between said fourth and sixth classes"(R.10), and asked that L.C.L. soap be put in fourth class and C.L. soap in sixth class "so as to maintain the proper relation and difference of rates between car load and less than car load lots" (R. 12). It further alleged that "common soap in less than car load lots is and always

has been in constant and sharp commercial competition with soap in car load lots" (R. 10), and that the defendants by putting L.C.L. soap in third class and C.L. soap in fifth class "have subjected and do thereby subject said traffic in common soap in less than car load lots to an undue and unreasonable prejudice and disadvantage in its commercial competition with common soap in car load lots" (R. 10).

If the foregoing allegations concerning the commercial relations between soap in car loads and soap in less than car loads, and the proper difference in rates between the two, had been coupled with the further allegation that fifth class rates were reasonable for soap in car loads, the case would be plain on the face of the petition. But the Commission has found that soap in car loads is properly in fifth class and that fifth class rates are reasonable and the case must be dealt with on that basis just as if the fact were alleged in the petition.

## II.

**Official Classification No. 20 does not increase the difference theretofore existing between L. C. L. and C. L. soap rates.**

From 1891 to 1900 soap was sixth class C. L. and fourth class L. C. L. Taking the rates between Cincinnati and Chicago as illustrations, which we do for convenience, the rate for C. L. soap was 12 cents per hundred pounds, and for L. C. L. soap 17 cents, or an extra charge for L. C. L. carriage of 5 cents per hundred, or 41.66 per cent. of the C. L. rate. The classification which the Commission enjoined makes an extra charge for L. C. L. freight of 5 cents per hundred, which is 33 1-3 per cent. of the C. L. rate. In other words by Classification No. 20 the railroads charge the same number of cents extra, as formerly, and a less percentage of the C. L. rate, for L. C. L. carriage. Formerly the L. C. L. rate was 141.66 per cent. of the C. L. rate; now it is only 133 1-3 per cent. of the C. L. rate. The railroads increased

the C. L. rate in 1900 from 12 cents to 15 cents, or 3 cents, which the Commission says was lawful, and they raised the L. C. L. rate from 17 cents to 20 cents, or 3 cents, which the Commission says was unlawful!

If we take the New York-Chicago rate for illustration we get the same result. C. L. soap was raised from 25 cents to 30 cents, and L. C. L. soap from 35 cents to 40 cents, or 5 cents in each case. The former L. C. L. rate was 10 cents more than the C. L. rate, and the present L. C. L. rate is 10 cents more than the C. L. rate. There has been no increase in the extra charge for L. C. L. The difference between the C. L. and L. C. L. rate remains the same. The percentage of difference is slightly decreased. Formerly the L. C. L. rate was 140 per cent. of the C. L. rate (35 cents as against 25 cents), now it is 133 1-3 per cent. of the C. L. rate (40 cents as against 30 cents).

The following testimony of C. E. Gill, chairman of the classification committee is not disputed. Rec. 233.

"Q. What was the effect of the rule as you finally established it in March, 1900, putting soap and other similar articles 20 per cent. less than 3d class, upon the relation of less than car load rates to car load rates, as they had theretofore prevailed?

A. It established precisely the same difference.

Q. So that after March 10th, 1900, the extra rate that was charged for the service of L. C. L. shipments over C. L. shipments of the same commodities, of the same materials, was the same as it had been before?

A. Precisely the same."

During the hearing before the Commission the chairman said: "It had the effect substantially of making the difference between car loads and less than car loads substantially the same as it was before," R. 573.

The witness McLeod speaking of the reduction on March 10, 1900, from third class to 20 per cent. less than third class, said:

"The controlling reason was to reduce the difference between the car load and less than car load to about what it had been, so that the large shipper under the new schedule would have no more advantage over the smaller shipper than he had before, or the car load would have no more advantage over the less than car load than before." R. 573.

## III.

**The extra charge made by the railroads for the extra service they render in carrying soap in less than car load lots does not cover the cost of the service.**

At the hearing before the Commission no evidence was offered on this point because it was not in issue. The petition admitted that the proper difference in rates between car load and less than car load shipments of common soap was precisely what the appellants claim. The evidence taken by the defendants in the circuit court, which the complainant did not attempt to controvert, and the findings of the Commission itself in other cases concerning the extra cost of carrying freight in less than car loads, leaves no doubt on the subject, and shows conclusively that the extra cost of handling soap in less than car loads is greater than the charge made by the railroads for the service.

The testimony of the following witnesses, taken in the circuit court, shows the cost of depot handling of L. C. L. freight in Cincinnati, Chicago, Columbus and East St. Louis, the average loading of L. C. L. cars, the percentage of different classes of freight therein, and the expense of making transfers en route, to-wit:

Charles A. Barnard, freight agent of the C. H. & D. at Cincinnati; R. R. Harris, freight agent of the Big Four at East St. Louis; A L. Robinett, freight agent of the P. C. C. & St. L. at Cincinnati; W. H. Sparks, freight agent of the Pennsylvania Lines at Columbus, Ohio; T. A. Connor, freight

agent of the Big Four at Cincinnati; Charles E. Fish, freight agent of the B. & O. S. W. at Cincinnati; J. D. Fidler, chief clerk of the freight station of the B. & O. S. W. at East St. Louis; John E. Loomis, freight agent of the P. C. C. & St. L. at Chicago; M. W. Pierce, freight agent of the Chicago, Milwaukee & St. Paul at Chicago; C. T. Scaife, freight agent of the Illinois Central at Chicago, and Joseph Rehkamp, loading foreman for the B. & O. S. W. at Cincinnati.

The defendants also took the following testimony in the circuit court to show the extra cost of transporting freight in less than car loads: J. C. Van Winkle, general superintendent of the Big Four; Charles E. Pierret, chief clerk to the general superintendent of the B. & O. S. W., and the testimony of Charles E. Gill, chairman of the Classification Committee, on several subjects.

Section 1 of the Interstate Commerce Act declares that all charges shall be reasonable and just for the "service rendered." What service do the railroads render in L. C. L. shipments as compared with C. L. shipments, and what does it cost?

In C. L. shipments the shipper loads the car and the consignee unloads it. This is done in a yard or on a side track. The carrier furnishes no depot or labor, and incurs no liability for improper loading. To get the benefit of C. L. rates on soap the shipper must ship at least 30,000 pounds. His average load is above that. A single way bill for the car is all the clerical service required.

In the case of L. C. L. shipments the carrier provides a depot and a large force of men who receive the goods from the shipper and carry them into the depot, assort them in piles according to destination, and load them into cars. The same process is gone through with in unloading and delivering them to the consignee at the point of destination, and very

frequently in transferring them from one car to another en route. For instance an L. C. L. shipment from Cincinnati to Erie, Pennsylvania, is loaded at Cincinnati, transferred into another car at Columbus, Ohio, and again at Alliance, and again at New Castle, and finally unloaded at Erie, making three transfers en route. See deposition of W. H. Sparks, freight agent of the P. C. C. & St. L. at Columbus, Ohio, R. 173. On the same subject see depositions of Barnard, freight agent of the C. H. & D. at Cincinnati, R. 116-117; Connor, freight agent of the Big Four at Cincinnati, R. 178; Fish, freight agent of the B. & O. S. W. at Cincinnati, pp. 187-189; Fidler, B. & O. S. W. at East St. Louis, p. 197; Loomis, freight agent of the P. C. C. & St. L. at Chicago, p. 220.

Two or three transfers en route are not uncommon.

The clerical service in connection with L. C. L. shipments is very heavy. A separate way bill must be made out for each shipment, and there may be 150 waybills for each car, as against one way bill for a C. L. shipment.

The details of this extra service and its cost is given in the testimony of the men in charge of freight depots at Cincinnati, Chicago, Columbus and East St. Louis, and is not contradicted by any evidence. It is shown that the cost of depot and transfer handling of L. C. L. merchandise almost consumes and in many instances more than consumes the entire extra charge which the railroads make for L. C. L. shipments. The average cost of depot handling alone at Chicago is 63 cents per ton of 2,000 pounds and at Cincinnati 33.5 cents, so that the mere depot handling of L. C. L. shipments between Cincinnati and Chicago comes to 4.82 cents per hundred. The Interstate Commerce Commission proposes to allow the railroads 2 cents per hundred for that service!

The testimony as to the cost of depot handling is as follows:

P. C. C. & St. L. at Chicago 64 cents per ton, Loomis, p. 219.

Chicago, Milwaukee & St. Paul at Chicago, 61 to 62 cents per ton, Pierce, p. 223.

Illinois Central at Chicago, 63 cents per ton, Scaife, p. 227.

C. H. & D. R. at Cincinnati, 35 cents per ton, Barnard, p. 113.

Big Four at East St. Louis, 72 cents per ton, Harris, p. 155.

P. C. C. & St. L. at Cincinnati, 31.4 cents per ton, Robinett, p. 161.

P. C. C. & St. L. at Columbus, 35.4 cents per ton, Sparks, p. 170.

Big Four at Cincinnati, 31.5 cents per ton, Connor, p. 177.

B. & O. S. W. at Cincinnati, 36.31 cents per ton, Fish, p. 187.

B. & O. S. W. at East St. Louis, 49.1 cents per ton, Fidler, p. 196.

The foregoing figures cover only the cost of the manual labor and the clerical work in handling L. C. L. freight at depots. They do not include an allowance, which should be made, for the cost of providing and maintaining the depots, and for interest on the investment, which is heavy, especially in cities.

The only criticism counsel for complainant made in the circuit court of the foregoing evidence as to the cost of depot handling was that it showed the average cost, and was not confined to the cost of handling common soap at depots; but the witnesses all testify that the average cost fairly represents the cost of handling soap. Loomis, p. 222; Pierce, p. 224; Scaife, p. 227; Robinett, pp. 164-169; Sparks, p. 171; Connor, p. 184; Fish, p. 187; Fidler, pp. 196, 197, 202.

## IV.

**The extra cost of transporting merchandise in less than car load lots exceeds the extra charge made by the railroads for L. C. L.**

We have shown the extra cost of depot and transfer handling. The extra cost of transporting goods in less than car load lots, after they are loaded, is even greater than the cost of handling them in depots. This is due principally to the fact that the average load in an L. C. L. car is between 5 and 6 tons, whereas C. L. cars carry on the average 22 tons, so that it takes 4 times as much equipment to carry the same amount of merchandise when shipped in less than car load lots, as when shipped by the car load. This is shown very clearly in the depositions of Van Winkle, superintendent of the Big Four, and Pierret of the B. & O. S. W., and is confirmed by findings of the Commission in other cases.

We make the following extracts from the testimony of Van Winkle; commencing at p. 256:

"Q. We are investigating in this case the relative cost of handling and transporting car load and less than car load freight. We have heretofore had evidence with respect to the cost of depot and transfer handling of less than car load freight. I do not wish to direct your attention in this examination to that, but to ask you whether, aside from the extra cost of depot and transfer handling of less than car load freight, there is a difference between the cost of transporting L. C. L. and C. L. freight?

A. There is a material difference in the cost of moving general merchandise known as less than car load freight, as compared with what we call car load freight.

Q. Please state in a general way in what that difference consists?

A. The difference consists in hauling a great deal more car weight in proportion to the revenue weight on the L. C. L. business as compared with the C. L. business.

Q. On what character of trains is L. C. L. freight carried?

A. Generally on merchandise trains, what are known as merchandise trains, moved on a very much faster schedule than the lower grades of freight. This makes it necessary to give merchandise trains proportionately less tonnage, so that increased time can be made.

Q. What is the average tonnage on your road of L. C. L. freight?

A. About five and a half tons per car.

Q. Is it necessary in the operation of your road and in making the various calculations for carrying on your business, to estimate the tonnage of L. C. L. freight; and have you done so?

A. Yes, sir, it is necessary so as to know something about the way to load your trains, and all that kind of thing, to have a general knowledge of the average tonnage per car; and for our own purposes we use the estimate of five tons per car for merchandise.

Q. Is the average of five and a half tons, which you have given, a liberal estimate for L. C. L. freight?

A. I think so, yes, sir.

Q. What is the average tonnage of car load freight?

A. About 22 tons per car.

Q. What is the average weight of the empty cars themselves?

A. About 18 tons.

Q. Can you give us a statement in tons, or percentage, or otherwise, of the extra cost of transporting the same amount of tonnage C. L. and L. C. L. freight; if so, please do so.

A. Taking one thousand gross tons as a train basis, merchandise with an average load of 5½ tons per car, 18 tons as the weight of the car, that is a total of 23½ tons per car. A train of 1,000 gross tons would be 43 cars. Those 43 cars would contain 236 tons of revenue freight. The weight of the cars would be 764 tons. Only 23.6 per cent. of the total tonnage would be revenue freight. Using the same basis of 1,000 gross tons on car load freight, the average load of 22 tons and the weight of the car at 18 tons, making a total of 40 tons, a train of 1,000 gross tons would consist of 25 cars. 550 tons would be revenue freight; 450 tons would be the weight of the cars; or 55 per cent. of the total tonnage would

be revenue freight. Using this same basis of 1,000 tons as a train load basis, there would be 125 per cent. more revenue freight in a train of car load freight than in the train of merchandise. Using this same basis again of 1,000 tons as a train load, it takes 25 cars to handle 550 tons of car load freight. It would take 100 cars to handle the same weight of general merchandise.

Q. Then according to your statement it requires in point of investment in equipment four times as much in the case of L. C. L. on an average than in C. L.; is that correct?

A. Yes, sir, in round figures.

Q. How about the wear and tear and depreciation, and cost of lubrication?

A. Well, we would have just four times as much invested in equipment; four times as much depreciation; four times the lubrication, and so forth, to carry the same amount of general merchandise as we would car load freight.

Q. How about the comparative cost of the train service in men and other items?

A. Well, that differs with the conditions. I don't hardly know how to answer that except in a general way. The expense depends almost entirely on the speed that is to be made. To answer the question I will give you a few comparisons. I made a memorandum of what we call—I made a memorandum of three, what we call, high class trains that handle merchandise and high class freight, and are run fast. One of these trains between Chicago and Cincinnati hauls 650 tons. The same class of engines on a slow train would haul 950 tons, or an increase of 46 per cent. Another high class train, from Indianapolis to Cleveland, hauls 700 tons. The same class of engine on a slow train would haul 1,050 tons, or an increase of 50 per cent. Another high class train, from Cleveland to St. Louis, hauls 1,150 tons. The same class of an engine on a slow train would haul 1,460 tons, or an increase of 26 per cent. Now the difference in the rating of the engines on those several trains is covered in part by the speed that it is necessary to run the train. I have shown here, in one instance, that the difference is 50 per cent.; in another instance, only 26 per cent. I would say that a fair general average would probably be, that the slow train would haul

one third more than the average merchandise or high class train.

Q. Do you mean one third more of gross weight including the car and contents?

A. Yes, sir, I am dealing with gross in this case entirely.

Q. Do you pay your train men by time, or by the mile?

A. By the mile. There are isolated exceptions to this, but the general practise is by the mile.

Q. Does that include the engineers?

A. Yes, sir.

Q. Does it also include the firemen and brakemen?

A. Yes, sir.

Q. You have used the term, "slow train." What is a slow train?

A. Slow train is made up of general car load freight that does not require such quick movement, such as coal, grain, lumber, hay, iron, and general commodities handled by car loads.

Q. It includes car load business—covers car load business?

A. Yes, sir. There is some car load business, however, that we handle on the fast trains, such as perishable freight, live stock, and that kind of thing; but that is not handled in the high class trains.

Q. Well, a car load of soap, would that be handled on slow trains?

A. Yes, sir, that would be considered a low grade of freight.

Q. What is the occasion or necessity for handling L. C. L. freight on the fast trains?

A. Well, sir, I suppose there are two reasons for that; the first is that the shipping public demand fast service on the high grades of freight, second, competition has made high class service necessary.

Q. The traffic department is distinct from your department is it?

A. Yes, sir.

Q. Are you required or expected by the Traffic Department to forward L. C. L. freight on those fast trains; is that the custom and the practice?

A. Yes, sir.

Q. Do the fast trains that carry L. C. L. freight have schedule times?

A. Yes, sir, just the same as passenger trains."

## V.

**The testimony as to the extra cost of L. C. L. business is confirmed by the findings of the Interstate Commerce Commission in other cases.**

The present difference between L. C. L. and C. L. rates on soap between Cincinnati and Chicago, or Cincinnati and St. Louis, or New York and Chicago is 33 1-3 per cent. of the C. L. rate. In other words the extra charge for L.C.L. service is only 33 1-3 per cent. of the C. L. rate. That is not unreasonable. It is not one half the actual cost. The Interstate Commerce Commission has found after careful investigation that the extra cost of transportation alone is "from 47 to 100 per cent." and that "the average difference in earnings per car from an average load of car load freight and an average load of less than car load freight is not far from 100 per cent." They so held in Thurber vs. New York Central & Hudson River R. R. Co. et al., 2 Int. Com. Rep. 742, 752; 3 I. C. C. R. 473, 502, where the Commission said:

"The differences in classification of car loads of one kind of freight to one destination, and less quantities of different kinds to various destinations, are based on the well known fact of a difference in the cost of service by the carrier. This fact, and the extent of the difference, were probably never so fully demonstrated by tests on different roads, and at different points, as in these cases. Exact average differences, or the difference upon any particular kind of traffic, have not been shown, and perhaps are not possible, but approximately the difference in cost of transportation as shown by testimony ranges from 47 per cent. to 100 per cent. exclusive of handling, loading and delivering, less than car load freights and transfers en route, and the average difference in earnings

per car from an average load of car load freight and an average load of less than car load freight is not far from 100 per cent. These averages are varied in both directions by differing conditions and volume of business at different points, but the facts show in a general way substantial grounds for a difference in classification."

In Business Men's League vs. Atchison, Topeka & Santa Fe Ry. Co., 9 Int. Com. Rep., 318, 345, the Commission said:

"It is obvious that the actual expense of handling less than car load business is greater than it is for car load traffic. The car load is generally loaded and unloaded by the shipper, while the less than car load is handled at both ends by the carrier. In the former case there is but one entry for each car load, while in the latter there are from 25 to 150 in case of each car which must be extended upon all the books where a minute of the transaction is entered. The expense of providing station facilities is very much greater in case of less than car load than car load business.

In addition to the difference in expense at the terminals, the actual cost of hauling is much more in the less than car load than in the car load. A crew of train men averages more miles in doing car load business than when distributing less than car load traffic from station to station. The loading of car loads is very much heavier than the less than car load, from which it results, first, that less non-paying weight is hauled in car load traffic, and second, that the car is more nearly used up to its capacity. A freight car weighs, approximately, 12 tons. If that car be loaded with 6 tons of freight, its movement involves the handling of 18 tons, of which but 6 tons are paying freight, while if the car were loaded with 16 tons, there would be a movement of 28 tons, of which 16 tons are paying freight. Assuming that the average load of less than car load business is 6 tons, and the average load of car load business 16 tons, and that the cost of hauling per ton is the same in both cases, a rate of $1.00 on car load would be about equivalent to $1.75 upon less than car load. But the car mileage is the same in both cases, and the cost

of movement does not increase in proportion as the weight of the car load increases, so that upon this basis of loading there would actually be a greater difference in cost of service."

In Chicago, Milwaukee and St. Paul Railway Company vs. Tompkins, 176 U. S. 167, Mr. Justice Brewer said, p. 178:

"Beyond the figures given from the books of the company of the actual cost of doing the total business of the company there was testimony of several experts as to the relative cost of doing local and through business. Such testimony is not to be disregarded simply because it can not demonstrate by figures the exact amount or per cent. of the extra cost. It is obvious on a little reflection that the cost of moving local freight is greater than that of moving through freight, and equally obvious that it is almost if not quite impossible to determine the difference with mathematical accuracy. Take a single line of 100 miles with 10 stations. One train starts from one terminus with through freight and goes to the other without stop. A second train starts with freight for each intermediate station. The mileage is the same. The amount of freight hauled per mile may be the same, but the time taken by the one is greater than that taken by the other. Additional fuel is consumed at each station where there is a stop. The wear and tear of the locomotive and cars from the increased stops and in shifting cars from main to side tracks is greater; there are the wages of the employes at the intermediate stations, the cost of insurance, and these elements are so varying and uncertain that it would seem quite out of reach to make any accurate comparison of the relative cost. And if this is true when there are two separate trains, it is more so when the same train carries both local and through freight. It is impossible to distribute between the two the relative cost of carriage. Yet that there is a difference is manifest, and upon such difference the opinion of experts familiar with railroad business is competent testimony, and can not be disregarded."

## VI.

**The petition of the Procter & Gamble Company did not charge unlawful discrimination against persons or localities.**

Section 3 of the act to regulate commerce makes it unlawful for a carrier to "give any undue or unreasonable preference or advantage (1) to any particular person, company, firm, corporation, or (2) locality, or (3) any particular description of traffic." The only violation of this section charged in the petition of the Procter & Gamble Company, with respect to soap in less than car loads was that the defendants by the reclassification of 1900 "have subjected and do thereby subject said traffic in common soap in less than car load lots to an undue and unreasonable prejudice and disadvantage in its commercial competition with common soap in car load lots" (R. 10). There was no charge of discrimination against any particular person, company, firm or corporation, or against any locality, but only against a "particular description of traffic," to-wit, "traffic in common soap in less than car load lots," and the discrimination complained of was that that "particular description of traffic" was subjected "to an undue and unreasonable prejudice and disadvantage in its commercial competition with common soap in car load lots." The decision of the circuit court that "the change [of 1900] resulted in unlawful discrimination between shippers" (R. 1092), was therefore unwarranted. No such charge had been preferred against the defendants before the Commission. New charges can not be made for the first time in the circuit court. Its jurisdiction under section 16 is limited to an examination of the correctness of the order of the Commission, and the jurisdiction of the Commission is confined to a determination of the particular violations of the act charged by the party complaining in the written petition which he is required to file under section 13.

The allegation of the bill of complaint filed in the circuit court that the change in classification resulted in unlawful discrimination and prejudice "against localities in Official Classification territory, wherein commodities are produced and transported, and against producers, shippers, dealers and consumers in said territory" (R. 5), stated no ground for relief, because it appeared from the petition of the Procter & Gamble Company before the Interstate Commerce Commission, a copy of which was attached to the bill as exhibit A, that no such discrimination was charged, and by the report of the Commission, a copy of which was attached to the bill as exhibit H, that no such discrimination had been found as a fact.

The foregoing statement applies with equal force to the suggestion in the report of the Commission (R. 75) that Rule 10, Subdivision B-2 of Official Classification (allowing mixed car loads of provisions and other articles taking fifth class) may discriminate against the manufacturer who is mainly engaged in manufacturing and selling soap in favor of meat packers who also deal in soap. No such discrimination is charged in the petition of the Procter & Gamble Company, nor is there any sufficient finding of facts to support an order on that ground, under section 3.

But the matter has become immaterial because Gill's testimony shows that "it [Rule 10, Subdivision B-2] was abrogated on January 1, 1903, from the official classification, some time before the report and opinion of the Commission in these cases was rendered." R. 238.

Rule 10, Subdivision B-2, while it was in force, had no legitimate bearing upon the question whether soap in less than car load lots was properly put in 20 per cent. less than third class. If Rule 10 gave meat packers, who were also soap makers, an undue advantage, the remedy was to set it aside, instead of disturbing the just and true and long estab-

lished relation between soap in car loads and soap in less than car loads.

## VII.

### The evidence did not show unlawful discrimination against persons or localities.

The report of the Commission, after pointing out that the change in the classification of L. C. L. soap from fourth class to 20 per cent. below third class raised the rate from Cincinnati to Boston four cents, while it did not raise the rate at all between New York and Boston, said:

"These differences are due to variations in the scales of rates prevailing in the different sections. The 20 per cent. less than third class rating for less than car loads applies to all shippers of L. C. L. lots of soap throughout the entire territory, but it increases some rates more than others, and leaves some of them as they were before it was adopted. When, for example, under the application of that rule, the rate from Cincinnati to Boston is increased four cents, and the rate from New York to Boston remains the same as compared with the fourth class rates formerly in effect, it is plain that this method of determining rates upon a percentage basis operates unequally upon the different shippers of L. C. L. quantities in that territory." R. 72.

The Commission also said:

"The new class inserted in the Official Classification on March 10, 1900, whereby 20 per cent. less than third class but not lower than fourth class rates are provided for less than car load soap and numerous other articles, operates with respect of soap, as above found in this case, to increase materially the rates paid by complainant and others in the section of country about Cincinnati, and presumably the rates paid by other shippers in most parts of the Central West, while it advances in less degree, or not at all, the less than car load rates paid by soap shippers in New York City and other parts of the East. In other words, the application of a fixed percentage to varying and different rates has the effect

of changing the relation of rates which before prevailed on shipments made by complainant and its competitors in the East to common territory." R. 82.

This was far from the finding as fact that the new classification gave any undue or unreasonable preference or advantage to any particular person or locality, in violation of section 3 of the act to regulate commerce, and was not so intended. It is not such a finding of fact as is "prima facie evidence of the matters therein stated," under section 16.

The whole evidence shows clearly that under Official Classification No. 20 eastern dealers have no advantage over western dealers in the matter of L. C. L. rates. Those rates are in fact less per mile out of Cincinnati, and elsewhere in Central Freight Association territory, than out of New York. The Cincinnati dealer can distribute his soap in less than car loads under Official Classification No. 20 to a greater distance for the same amount of freight money than the New York dealer, except to a few points affected by water competition. This is illustrated by the following tables in which the rates given are 20 per cent. less than third class:

Table 1.

| From Cincinnati to | Miles. | Rate in cents. |
|---|---|---|
| Pittsburgh, | 318 | 21 |
| Ashtabula, | 312 | 20 |
| St. Louis, | 343 | 20 |
| Cleveland, | 263 | 18½ |
| Detroit, | 262 | 19½ |
| Parkersburg, | 195 | 18 |
| Vincennes, | 192 | 18 |
| Terre Haute, | 183 | 18 |
| St. James | 178 | 18 |
| Newcomerstown, | 203 | 18 |
| Conesville | 183 | 18 |

| | | |
|---|---|---|
| Sonora, | 182 | 18 |
| Hyatts, | 180 | 18 |
| Lawrenceville, | 211 | 18 |
| Worthington | 182 | 18 |
| Paris, | 202 | 18 |
| Monticello, | 209 | 18 |
| Guernsey, | 214 | 18 |
| Chicago, | 305 | 20 |
| Grand Rapids, | 308 | 22½ |
| Peoria, | 321 | 20 |
| Nottingham, | 292 | 20 |

Table 2.

| From New York to | Miles. | Rate in cents. |
|---|---|---|
| Rochester, N. H., | 313 | 23 |
| Portland, | 348 | 23 |
| Lowell, | 261 | 22 |
| Nashua, N. H., | 272 | 22 |
| Baltimore, | 187 | 18 |
| Worcester, | 198 | 20 |
| Attleboro, | 200 | 20 |
| Scranton, | 145 | 18 |
| White Haven, | 144 | 18 |
| Wilkesbarre, | 176 | 18 |
| East Branch, | 150 | 18 |
| Parksville, | 124 | 18 |
| Lordville, | 153 | 18 |
| Goldboro, | 123 | 18 |
| Binghampton, | 206 | 20 |
| Sidney, | 205 | 20 |
| Niantic, | 150 | 20 |
| East Greenwich, | 175 | 20 |
| Herkimer, | 229 | 17(canal rate) |
| Brighton, | 134 | 18 |
| Portsmouth, N. H., | 290 | 23 |

Take the first items in each of the foregoing tables for illustration. It appears from them that a Cincinnati dealer can ship 100 pounds of soap L. C. L. to Pittsburgh, a distance of 318 miles, for 21 cents, while the New York dealer must pay 23 cents for shipping it 313 miles to Rochester, N. H. A Cincinnati dealer can ship 100 pounds of soap L. C. L. to St. Louis, a distance of 343 miles, for 20 cents, while the New York dealer must pay 23 cents for shipping the same box 348 miles, to Portland, and so on.

Mr. Gill's testimony taken in the circuit court shows that the rates for L. C. L. soap in the territory tributary to New York are as high, and in most instances higher, for the same distance, as the rates out of Cincinnati and in the Middle West, notwithstanding the advantage New York shippers have on account of the water competition furnished by Long Island Sound steamers and Hudson River boats. Mr. Gill compares the actual rates out of New York for L. C. L. soap under Official Classification No. 20, with the rates in Central Freight Association territory. Rec. 234-237. His conclusion is thus stated at p. 237:

"Q. So that even taking the Pennsylvania railroad with the water competition, the soap manufacturer in New York City pays as great or a greater rate than the soap manufacturer in Cincinnati?

A. Per mile, yes, sir."

The following table compiles his testimony concerning L. C. L. soap rates in Central Freight Association territory, under Official Classification No. 20, compared with those out of New York on the Erie railroad, which is not affected by water competition. The table shows the present L. C. L. soap rates in C. F. A. territory, the increase that was effected in them by Official Classification No. 20, the present rates on the Erie railroad, and the increase that was effected in them by Official Classification No. 20.

| Distance in Miles. | Rates in C.F.A. Territory. | Rates on Erie R. R. | Increase made by Official Classification No. 20 in C. F. A. Territory. | Increase made by Official Classification No. 20 on Erie R.R. |
|---|---|---|---|---|
| | cents. | cents. | cents. | cents. |
| 50 | 8.5 | 15 | none | 1 |
| 65 | 10.5 | 15 | ½ | 1 |
| 75 | 12 | 17 | 1.5 | 1 |
| 100 | 15 | 18 | 2.5 | 2 |
| 150 | 16 | 18 | 2.5 | 1 |
| 200 | 17.5 | 20 | 2.5 | 2 |
| 300 | 20 | 20 | 3 | 2 |
| 400 | 23 | 22 | 3 | 3 |
| 450 | 24 | 22 | 3 | 3 |

The foregoing comparison shows that the soap manufacturer in Central Freight Association territory is at no disadvantage in the matter of L. C. L. rates as compared with his New York competitor.

It is true that in some instances the advance in rates made on the New York shipper by Classification No. 20, is slightly less than the advance made on the Western shipper, but it ought to be so, because the Eastern rate is still higher than the Western rate. For instance for a distance of 100 miles the advance in C. F. A. territory was from 12½ cents to 15 cents (an advance of 2½ cents), while on the Erie railroad it was from 16 cents to 18 cents (an advance of 2 cents). But the new rate is still 3 cents in favor of the Western manufacturer, who pays 15 cents as against 18 cents for the same distance on the Erie railroad.

Mr. Gill was asked to compare L. C. L. soap rates out of New York and Chicago to competitive points. He answered as follows, p. 237:

"Pittsburgh would be a fair illustration as being about equi-distant from New York and from Chicago, Chicago being a very large soap manufacturing point as well as New York. The present rate on soap L. C. L. Chicago to Pitts-

burgh is 24 cents per one hundred pounds; that was an advance over the old fourth class rate of 3 cents per one hundred pounds. The present L. C. L. rate on soap from New York to Pittsburgh is also 24 cents, the same as from Chicago to Pittsburgh, and the advance over the old fourth class rate is also 3 cents per one hundred pounds. With reference to soap in car loads classified at fifth class, the rates from New York and Chicago to Pittsburgh are the same, that is to say, 18 cents per one hundred pounds, being an advance of 3 cents per one hundred pounds."

But suppose the railroad rates for soap in less than car loads out of New York in certain directions, where they have water competition, are less than those out of Cincinnati. What has that to do with the reasonableness of the extra charge the defendants make for handling soap L. C. L.? The extra cost of depot and transfer handling of L. C. L. merchandise in the Middle West, and the extra cost of transporting it, is not affected by the fact that Sound steamers and Hudson river boats compete with the railroads in carrying freight in the territory tributary to New York.

## VIII.

**If the classification of soap in less than car loads ought to be based upon its relation to other articles in less than car loads, as the circuit court held, and not upon its relation to soap in car loads, no violation of the act to regulate commerce results from putting soap L. C. L. in 20 per cent. below third class.**

While the circuit court held that "the classification of soap for carriage in less than car load lots should be based upon its relation to other articles for carriage in less than car load lots, and not upon its relation to soap for carriage in car load lots" (R. 1091), the court did not point out how or in what way the principle was disregarded by placing common soap

in less than car loads in 20 per cent. below third class. It did not mention any L. C. L. articles which should go in the same class with L. C. L. soap which were improperly disassociated by putting common soap L. C. L. in the class to which the defendants have assigned it in Classification No. 20.

Gill's testimony gives a list of forty articles in 20 per cent. less than third class, L. C. L. which he says are of similar character to common soap L. C. L. The following is his testimony on that subject, R. 238:

Q. The opinion of the Commission with respect to C. L. soap refers to the relation of soap and other articles that are put in 5th class C. L. What have you to say with respect to a similar comparison between soap L. C. L. under Rule 26 and other articles covered by that Rule in official classification?

A. If the views of the Commission are sound with reference to the comparison in car loads, I do not see why they should not apply equally upon the comparison with L. C. L. articles rated the same in less than car loads as soap. That is to say, articles of similar character in bulk and weight, comprising articles of food consumption, groceries, etc., on which the relation of rates has not only been the same in car loads but in less than car loads. I have a list of those articles here, some 40 in number, and it appears to me that it would be absolutely unjust to reduce soap in less than car loads rated Rule 26 to 4th class, and leave other articles now rated the same as soap, both L. C. L. and C. L. where they are, especially in view of the comparison referred to in the Commission's Report where comparison seems to be the controlling element.

Q. Please give us the list of the articles to which you refer as being analogous to soap covered by Rule 26, Official Classification No. 20?

A. Apple or fruit butter, axle grease, candies, canned fish, canned vegetables, canned soups, and broths, coffee, cracker meal, epsom salts, fish cured in packages, grease, hoof stuffing, lard, concentrated lye, cured meats in packages, mince meats, molasses in cans, oysters in cans, flour paste, potato

flour, preserves in packages, soft soap, soap extracts, soap powders, caustic soda in cans, starch, sugar, syrup in cans, tallow, tomatoes canned, and various items of vegetables and garden roots, washing crystals and washing powder.

Q. Are those articles in your opinion analogous to soap under the proper classification of L. C. L. soap?

A. They are and have been rated similarly, I think, all of them, both in less than car loads and in car loads.

The Commission itself in determining the proper classification of common soap in car loads, especially compares it with articles all of which are in 20 per cent. below third class in less than car loads, viz: coffee, sugar, smoked and salt fish (R. 53 and 65) and says further:

"The present less than car load rating of 20 per cent. less than third class is, however, applied to numerous articles which take fifth class in car loads, among them coffee, sugar, fish (smoked or canned), and canned fruits and vegetables," R. 69, 70.

## IX.

**The evidence does not show that defendants' rates for the carriage of common soap in less than car loads are unjust or unreasonable.**

We have shown that they are not unreasonable as compared with car load rates (which the Commission hold to be reasonable), and there is no finding in the report of the Commission that they are unjust or unreasonable "in and of themselves," to use Mr. Justice White's expression in 181 U. S. 26. The nearest approach is the following:

"The difference of 15 cents between fifth class and third class, which was in effect as between car load and less than car load shipments from January 1 to March 10, 1900, would plainly be excessive, and the present difference, which varies according to a given per cent. as applied to different scales of rates, appears to be inequitable and unjust, and the fact is so found," R. 76.

That is not a finding that any rate or rates of the defendants for carrying soap L. C. L. are unjust or unreasonable per se, but that the difference between car load rates and less than car load rates is inequitable and unjust. That claim is disposed of by the admission in the petition of the Procter & Gamble Company that the very difference between fifth class and 20 per cent. less than third class is the proper difference between soap in car loads and less than car loads, and by the additional evidence taken in the circuit court and discussed under the third, fourth and fifth heads of this brief, which establishes conclusively that the difference between C. L. and L. C. L. rates is less than the actual cost of the extra service.

In its "statement of views" (R. 82) the Commission says that "fourth class rates for less than car loads were allowed by carriers in official classification territory for ten or more years prior to 1891, when they charged fifth class rates for car loads, and they also remained in effect during all the time from 1891 to 1900, when car load soap was sixth class." They say: "Soap in less than car loads, therefore, always had fourth class rates until January 1, 1900. A presumption that such rates were reasonable arises from the voluntary action of the carriers in keeping these rates in effect during such a long period; and that presumption has not been overcome, in our judgment, by the evidence presented in this case."

But the evidence before the Commission shows that the cost of operating and maintaining railroads was greatly increased about 1900 on account of increase in the cost of labor and rise in the price of material and supplies, and the answers of the defendants before the Interstate Commerce Commission alleged that Official Classification No. 20 was "the result of a general revision of former classifications made for the purpose of meeting an imperative demand for increased revenue, rendered necessary by reason of increase in the cost of operating and maintaining respondents' railroads." R. 14.

The extent of the increase is shown in the testimony of the following witnesses before the Commission:

G. L. Potter, General Superintendent of Motive Power of the Pennsylvania Lines West of Pittsburgh, R. 503-528. He presented a statement which is filed as Exhibit 20 (R. 743), showing an increase in the price of locomotives of 40.5 per cent. in 1900 over 1899, and of 39.1 per cent. over 1898. His Exhibit No. 21 (R. 743) shows an increase in cost of freight cars in 1900 of from 40 to 50 per cent. over 1899 and 1898. His Exhibit No. 22 (R. 744) shows in detail the large percentage of increase in the cost of the principal items of material. His Exhibit No. 23 (R. 746) shows an average increase in the cost of freight car equipment of 14.2 per cent. in 1900 over 1899, and of 27.6 per cent. over 1898. His Exhibit No. 24 (R. 746) shows an increase in the price of steel rails of 83.3 per cent. in 1900 over 1899, and of 73.7 per cent. over 1898. His Exhibit No. 25 (R. 747) shows an increase in the price of coal of 29.4 per cent. in 1900 over 1899, of 37.5 per cent. over 1898, and of 46.7 per cent. over 1897.

F. D. Casanave, General Superintendent of Motive Power of the Pennsylvania Railroad Company, R. 528-560. His Exhibit No. 26 (R. 747) shows the percentage of increase in 1900 over 1898 and 1899 of the cost of the principal items of material used in freight car construction, ranging from 16.2 per cent. increase in the cost of oak to 194.7 per cent. increase in the cost of steel axles. His Exhibit No. 26 C-1 (R. 748) shows the percentage of increase in 1900 over 1898 and 1899, of the cost of freight equipment cars, ranging from 34.7 per cent. to 52.3 per cent. His statement, Exhibit No. 27 (R. 749) shows the percentage of increase in 1900 over 1898 and 1899 in the cost of the principal items of material used in locomotive construction ranging from 24.3 per cent. for oak, to 201.7 per cent. for bloom steel. His statement,

Exhibit No. 27A-1 (R. 750) shows the percentage of increase for 1900 in the cost of new locomotives over 1898 and 1899, ranging from 24.3 per cent. to 40.4 per cent. His statement, Exhibit No. 27A-2 (R. 750) shows the building of 128 locomotives on the programme of 1900 costing $1,798,352, at an increased cost of 32 per cent. His statement, Exhibit No. 28 (R. 751) shows the percentage of increase in the cost of freight car repairs for 1900 over 1897, 1898 and 1899, ranging from 32.9 per cent. to 37.6 per cent. His statement, Exhibit No. 29 (R. 752) shows an increase in the cost of maintenance of equipment in 1900 of 14.4 per cent. over 1897, of 21.1 per cent. over 1898 and of 24.5 per cent. over 1899. His statement, Exhibit No. 30 (R. 752) shows the percentage of increase in the cost of locomotive repairs and of locomotive fuel.

A. H. McLeod, Traffic Manager of the C. H. & D. Ry. Co. R. 560-630. He testified that the cost of coal was 19 cents per ton more in 1900 than in 1899, involving an additional outlay for his company of $5,700 per month on that account, and that the increased cost of mining alone was 14 cents a ton. Steel rails increased from $17 per ton in 1897 and 1898 to $34 in 1899 and $35 in 1900.

W. H. Coverdale, Assistant Engineer of the Pennsylvania Company, in charge of construction. R. 630-640. He testified that the price of labor had increased from $1.15 per day in 1898 to $1.50 in 1900, and that the price of grading had increased 30 per cent. on account of the increase in the cost of labor. There was an increase in the cost of bridges of 40 per cent.

W. C. Cushing, Engineer, M. of W. Pittsburgh Division of the Pennsylvania Lines of the Southwest System (R. 640), gives detailed statements of the increase in labor and material in his department.

John B. Brittain, Special Agent of the Accounting De-

partment of the Pennsylvania Lines West of Pittsburgh, R. 645-660. His statement, Exhibit No. 40 (R. 754) shows the increased ratio of expenses to earnings.

Thomas H. Johnson, Chief Engineer of the P. C. C. & St. L. Ry. Co., R. 660, et seq. gives in detail the increased expense of his department.

Archibald Fries, Assistant General Freight Agent of the B. & O. S. W., R. 675-714. His exhibits, Nos. 46 to 56 inclusive, are full and complete.

In the face of such an array of testimony as to changed conditions no inference could be drawn or presumption indulged from the satisfaction of the railroads with rates under former conditions. The Commission, if it had power to fix rates, might differ with the boards of directors of the railroads as to the amount of increase in rates that was necessary to meet increased cost of maintenance and operation, but there was no such investigation; the whole subject was dismissed with an erroneous application of the doctrine of presumptions. It is true that a presumption arose that the former rates were reasonable from the voluntary action of the railroads in adopting them. But the fact (thus proved by presumption) that they were reasonable, was not proof or evidence to prove, that they were now adequate under new and different conditions.

The Circuit Court said, R. 1090:

"Testimony taken since the commencement of this suit shows that the cost of service for handling and carrying freight in less than car load lots greatly exceeds the cost of handling and carrying it in car load lots, but it is not shown that as between the two the relative cost of handling and carrying ever increased one way or the other either before or since the new classification was made; and the evidence, therefore, is not sufficient to rebut the presumption that the original classification of common or laundry soap was and is

reasonable and just, arising from the voluntary maintenance thereof by the defendants for thirteen years prior to the change complained of.'

The court overlooked the abundant testimony before the Commission to show the recent increase in the cost of labor, which is one of the principal items of the expense of handling freight in less than car loads, and the additional testimony to the same effect in the circuit court. John E. Loomis, R. 219, M. W. Pierce, R. 223-4, and C. T. Scaife, R. 227, testified that the cost of handling less than car load freight in Chicago had increased twenty per cent. on account of the advance in the pay of clerks and laborers. Gill testified that the cost of terminal service had increased on account of the increase of wages. R. 238. It is a matter of common knowledge that there was a great increase in the cost of labor and material.

No argument against an increase in the rates for L.C.L.soap can be justly drawn from the fact that the railroads put L. C. L. soap in fourth class from 1891 to 1900. They put it in fourth class during those years because C. L. soap was in sixth class by order of the Commission, and the railroads recognized that the difference between fourth class and sixth class was the proper difference between C. L. and L. C. L. soap. That is what they say now. It is the very difference recognized in Classification No. 20. The difference between sixth class C. L. and fourth class L. C. L., which prevailed formerly, is the precise difference which now exists between fifth class C. L. and 20 per cent. less than third class L. C. L., under Classification No. 20.

What the railroads did in classifying L. C. L. soap prior to 1891 (16 years ago) was hardly relevant. But it is misleading to say that they put common soap L. C. L. in fourth class and C. L. soap in fifth class. They divided soap into two classes, putting fancy, toilet, and castile soap L. C. L. in

second class (R. 238, 249, 250), which was doubtless a consideration for putting common soap L. C. L. in fourth class. Gill testifies that fancy, castile and toilet soap "represented 25 to 35 per cent. of the whole." R. 250.

The Commission might have said that C. L. soap ought not to have been raised to fifth class, because it was in sixth class from 1891 to 1900. They held that fact "insufficient of itself to sustain complainant's contention that fifth class rates for car load soap are unreasonable." They said it was a question "of classification; that is of relative rates."

It remains to notice the comparative tables of tonnage and earnings filed by the complainant. R. 213-215. The "net earnings" shown by those tables are not net earnings to stockholders. In railroad parlance "net earnings" are the gross earnings after deducting operating expenses. Fixed charges and capital construction come out of net earnings. Counsel in the circuit court compared the net earnings of the Pennsylvania Railroad Company in 1904 with its net earnings in 1899. But the net earnings of 1904 were earnings on a largely increased investment represented by stock and bonds which the company put out in the mean time for new equipment, additions to track and road bed, new and larger depots, etc., with which to be able to make those earnings. It is well known that the additions to the capital investment of the railroads on this account during those years were very large. Take the case of the Pennsylvania Railroad Company as an illustration. Its capital stock on December 31, 1899, was $129,305,500. (Poor's Manual for 1900, p. 682). On December 31, 1904, it was $301,285,650. (Manual of Statistics for 1905, p. 248), an increase of $171,980,150.

Out of the net earnings shown on the statements referred to large sums were taken to meet extraordinary charges for betterments charged direct to income. A statement which stops with "net earnings," and does not show how the net earnings are applied, proves nothing.

If we take the statements of tonnage (R. 213) we find, by comparing the figures for the years 1900 and 1904, after Official Classification No. 20 went into effect, with those for the years 1891 and 1895, before it went into effect, that the increase in the volume of business, is in greater proportion than the increase in net earnings. For instance, the increase in gross earnings of the P. C. C. & St. L. Ry. Co. for 1904, as compared with 1895, is about 66 per cent., whereas the increase in operating expenses is 77 per cent., and the increase in net earnings only 31 per cent. Substantially the same comparison is shown in the case of the Pennsylvania Railroad Company.

But the fact that the Commission has found fifth class rates to be reasonable for soap in car loads, taken in connection with the uncontroverted proof as to the extra cost of handling it in less than car loads, and the admissions of the original petition as to the proper difference in rates between the two, seems to make it clear that soap in less than car loads is entitled to rates equal to 20 per cent. less than third class.

The present difference in rates between soap in car loads and soap in less than car loads has been in force for sixteen years, nine years before Official Classification No. 20 was promulgated and seven years since then, and is not objected to by any shipper. The Procter & Gamble Company did not complain of it in their petition to the Interstate Commerce Commission. On the contrary they insisted that C. L. soap should be in sixth class and L. C. L. soap in fourth class, "so as to maintain the proper relation and difference of rates between car load and less than car load lots" (R. 12). We have seen that the relation between fourth class and sixth class, which the Procter & Gamble Company thus insisted upon as "the proper relation and difference of rates between car load and less than car load lots," is the same relation and

difference of 5 cents between Cincinnati and Chicago, and 10 cents between New York and Chicago, that exists between fifth class and 20 per cent. less than third class. We did not go into that relation before the Commission, for no issue was raised with respect to it. We were entitled by the pleadings to assume that if fifth class was held to be proper for soap in car loads, 20 per cent. less than third class would be held proper for soap in less than car loads. The petitioner admitted that that was the proper relation between the two, and the Commission had no authority to make an order against the defendants, in conflict with the petitioner's own admission on that vital subject.

Classification No. 20 at first put L. C. L. soap in third class, which did increase the former relation between C.L. and L. C. L. soap. The soap manufacturers complained and at a conference between them and representatives of the railroads "20 per cent. less than third class was established as a compromise. It gave the shippers a material reduction and the carriers a slight advance in their rates." Gill, R. 233.

Gill testifies that no complaint has ever been made to the Classification Committee that the extra charge which the railroads now make for carrying soap in less than car loads is unjust or unreasonable. (R. 233, 234). Neither the Procter & Gamble Company nor any other manufacturer, dealer or shipper has taken any step to enforce the order of the Commission, nor does it appear that any one has requested the Commission to do so. The primary purpose of the suit seems to be to vindicate its authority.

## X.

**The order of the Commission was not a lawful order, within the power conferred on it by the act of Congress.**

There was no charge in the petition of the Procter & Gamble Company that any particular rate or rates of any

one or more of the defendants was unjust or unreasonable. No rates were specified. The complaint was against a classification and not against a rate or rates. This was so in the nature of things, for it was known, as appears from the report of the Commission (R. 72) that the effect of the change in classification was to leave some L.C.L. rates unchanged and to increase others in varying degrees.

The essential nature of the complaint is illustrated by the character of the order made thereon. No particular rate or rates of one or more of the defendants is enjoined. The order is to cease from charging, for the transportation of common soap in less than car loads, rates in excess of those charged from time to time for the carriage of an indefinite number of other articles, viz: those which at any time may be "designated as third class in their established freight classification called and known as the Official Classification." R. 83, 84. Such an order is not the exercise of power to prohibit a violation of section 1 of the act.

Classification is a matter of the relation of the subjects of traffic to each other, and the power of the Commission to enjoin a classification must be found and exercised, if at all, under section 3, on proof that the classification complained of works an unlawful discrimination against some "particular description of traffic."

We have discussed the question of discrimination under the first head of this brief.

But it is clear that the Commission would not have had power to make the order involved in this case, even if it had been shown that a classification which put L. C. L. common soap in 20 per cent. less than third class resulted in an unlawful discrimination against that "particular description of traffic," in contravention of section 3. Upon such showing the Commission might perhaps have had power to enjoin the defendants from charging higher rates for interstate ship-

ments of soap in less than car loads, than they charged for sugar or other specified commodities in less than car loads (as between which and soap in less than car loads, an unlawful discrimination was shown), or more than five cents between Cincinnati and Chicago for carrying soap in less than car loads than they charged for soap in car loads, or more than ten cents in excess of the car load rate between New York and Chicago, if it was shown that a larger extra charge between those points was an unlawful discrimination between traffic in soap in less than car loads and traffic therein in car loads. But the Commission did not so limit its order. It made a general sweeping order that the defendants, after June 15, 1903, should never charge for carrying soap in less than car loads, no matter where or under what circumstances or between what points, rates equal to 20 per cent. less than they charged for any commodity whatsoever, either in car loads or less than car loads, then or thereafter "designated as third class in their established freight classification called and known as the Official Classification," R. 84. This was not the exercise of any power conferred upon the Commission within the principles declared by this court in Interstate Commerce Commission vs. Cincinnati, New Orleans & Texas Pacific Railway Company, 167 U. S. 479.

The committee of congress that framed the act to regulate commerce did not intend to give the Commission the power to prescribe or condemn a classification as such. They intended only to give the Commission power to investigate rates for the purpose of determining whether a given rate was reasonable or produced undue discrimination. They said in their report, p. 188:

"The difficulty encountered has been to provide for, or to require, uniformity without especially prescribing the classification which shall be adopted, or without giving a commission authority to establish a classification, which would be equivalent to authorizing such commission to fix rates."

It will be noticed that the rates enjoined are not rates equal to a certain per cent. above fourth class, but rates equal to 20 per cent. less than third class, although no comparison between common soap in less than car loads and commodities in third class was made in the testimony or suggested in the petition of the Procter & Gamble Company. The Commission had no evidence before them on that subject. The prayer of the Procter & Gamble Company was to put common soap L. C. L. in fourth class and what comparison was made by the witnesses was between soap and the commodities in fourth class. The evidence does not contain a list of the commodities in third class.

What would become of the order if the defendants, or some of them, should increase the classes to eight or ten or twelve or reduce them to two or three, so that the third class of 1903 should become substantially the first or second or fourth or fifth class of 1897, or if the defendants should abolish an "established freight classification called and known as the Official Classification?" Would they be in contempt of the Commission or of the circuit court whose decree, following the terms of the order, does not enjoin the defendants from charging rates equal to 20 per cent. less than those charged for any particular commodities, or for the commodities then in third class, but rates, "equal to 20 per cent. less than the rates fixed by them for the transportation of articles designated as third class in their established freight classification, called and known as the "Official Classification" (R. 1094)?

We have assumed that the order was intended to enjoin rates equal to 20 per cent. less than rates fixed for articles then or thereafter designated as third class in the Official Classification. The decree of the circuit court, which was not entered until November 25, 1905, seems to so construe the order. If it was intended to enjoin rates equal to 20 per cent. less than the rates for articles that were in third class on

January 1, 1900, when Official Classification No. 20 became effective, or that were in third class on the day the order was made, it becomes even more anomalous if possible, because it would fix perpetual rates for soap in less than car loads at 20 per cent. less than the rates for particular commodities, without reference to future conditions or circumstances affecting the one or the other.

## CONCLUSION.

In Interstate Commerce Commission vs. Cincinnati, New Orleans & Texas Pacific Railway Company, 167 U. S. 479, 493, and in earlier and later cases, this court has quoted and adopted the view expressed by the late Justice Jackson, as circuit judge, in the case of The Interstate Commerce Commission vs. Baltimore & Ohio Railroad Company, 43 Fed. 37, the judgment in which was affirmed by this court in 145 U. S. 263:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

We respectfully submit that the decree of the circuit court should be reversed and the bill dismissed.

LAWRENCE MAXWELL, JR.,
EDWARD COLSTON,
Counsel for the Appellants.

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# Supreme Court of the United States,

OCTOBER TERM, 1906.

No. 201.

THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY, et al., *Appellants*,

*vs.*

THE INTERSTATE COMMERCE COMMISSION.

**Appeal from the Circuit Court of the United States for the Southern District of Ohio.**

**Tables showing rates, on less than car loads, out of New York City and out of Cincinnati to points named.**
**Comparison of rates per mile out of New York City with rates per mile out of Cincinnati.**

THE BARCLAY PRINTING CO., Strobridge Building, 108-118 W. Canal St., Cincinnati, O.

# Supreme Court of the United States,

OCTOBER TERM, 1906.

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## No. 201.

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THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY, et al., *Appellants*,

*vs.*

THE INTERSTATE COMMERCE COMMISSION.

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Table No. 1.

Showing rates out of New York City to points named, on less than car loads. Compilation made from Procter & Gamble plat put in evidence before Commission. (See R. 741.)

| NEW YORK CITY TO | Miles | RATES 3d Class | 3d Class less 20 per cent. | 4th Class |
|---|---|---|---|---|
| Port Chester | 25 | 8 | 7 | 7 |
| Fairfield | 50 | 10 | 8 | 8 |
| New Haven | 74 | 12 | 10 | 10 |
| Westbrook | 102 | 14 | 12 | 12 |
| Niantic | 150 | 22 | 20 | 20 |
| New London | 125 | 14 | 12 | 12 |
| E. Greenwich | 175 | 22 | 20 | 20 |
| Attleboro | 200 | 22 | 20 | 20 |
| Boston | 233 | 16 | 16 | 16 |
| Lowell | 261 | 25 | 22 | 22 |
| Nashua | 272 | 25 | 22 | 22 |
| Portsmouth | 290 | 26 | 23 | 23 |
| Rochester, N. H. | 313 | 26 | 23 | 23 |
| Portland | 348 | 26 | 23 | 23 |

| NEW YORK CITY TO | Miles | RATES 3d Class | 3d Class less 20 per cent. | 4th Class |
|---|---|---|---|---|
| Springfield | 136 | 14 | 12 | 12 |
| Worcester | 198 | 22 | 20 | 20 |
| Greenfield | 171 | 17 | 15 | 15 |
| N. Adams | 209 | 17 | 15 | 15 |
| Tarrytown | 27 | 10 | 9 | 9 |
| Garrison | 52 | 11 | 10 | 10 |
| Poughkeepsie | 76 | 13 | 11 | 11 |
| Tivoli | 100 | 14 | 12 | 12 |
| Stuyvesant | 126 | 14 | 13 | 13 |
| Albany | 144 | 14 | 13 | 13 |
| Amsterdam | 177 | 19 | 16 | 16 |
| Palatine Bridge | 200 | 19 | 16 | 16 |
| Herkimer | 229 | 21 | 17 | 17 |
| W. Nyack | 25 | 11 | 10 | 10 |
| Cornwall | 52 | 11 | 10 | 10 |
| Rock Tavern | 65 | 15 | 12 | 12 |
| Mechanictown | 75 | 18 | 14 | 13 |
| Ellenville | 100 | 20 | 16 | 14 |
| Parkesville | 124 | 23 | 18 | 17 |
| E. Branch | 150 | 23 | 18 | 17 |
| Walton | 179 | 25 | 20 | 18 |
| Sidney | 205 | 25 | 20 | 18 |
| Allendale | 26 | 12 | 10 | 10 |
| Monroe | 50 | 15 | 12 | 11 |
| Otisville | 76 | 19 | 15 | 14 |
| Port Jervis | 88 | 19 | 15 | 14 |
| Lackawaxen | 111 | 20 | 16 | 15 |
| Coketon | 131 | 20 | 16 | 15 |
| Lordville | 153 | 23 | 18 | 17 |
| Deposit | 177 | 23 | 18 | 17 |
| Binghampton | 206 | 25 | 20 | 18 |
| Boonton | 30 | 13 | 10 | 10 |
| Waterloo | 51 | 15 | 12 | 12 |
| Bridgeville | 75 | 19 | 15 | 14 |

| NEW YORK CITY TO | Miles | RATES 3d Class | 3d Class less 20 per cent. | 4th Class |
|---|---|---|---|---|
| Stroudsburg | 92 | 20 | 16 | 15 |
| Goldsboro | 123 | 23 | 18 | 17 |
| Scranton | 145 | 23 | 18 | 17 |
| Foster | 172 | 23 | 18 | 17 |
| Elizabeth | 13 | 7 | 6 | 6 |
| Red Bank | 39 | 13 | 10 | 10 |
| Lakehurst | 67 | 15 | 12 | 12 |
| Winslow Jct. | 105 | 15 | 12 | 12 |
| Bridgeton | 134 | 22 | 18 | 18 |
| Bayside | 144 | 22 | 18 | 18 |
| Metuchen | 26 | 9 | 7½ | 7½ |
| Princeton | 50 | 14 | 11 | 11 |
| Torresdale | 75 | 15 | 12 | 12 |
| Philadelphia | 91 | 15 | 12 | 12 |
| Wilmington | 117 | 19 | 15 | 14 |
| Newark Centre | 136 | 22 | 18 | 17 |
| Perryville | 150 | 22 | 18 | 17 |
| Baltimore | 187 | 23 | 18 | 18 |
| Washington | 220 | 25 | 20 | 20 |
| Oak Tree | 25 | 9 | 7½ | 7½ |
| Flemington City | 51 | 15 | 12 | 12 |
| Bethlehem | 89 | 17 | 14 | 14 |
| Allentown | 94 | 18 | 15 | 15 |
| Slatington | 110 | 20 | 16 | 14½ |
| White Haven | 144 | 23 | 18 | 17 |
| Wilkes Barre | 176 | 23 | 18 | 17 |
| Bound Brook | 31 | 13 | 10 | 9 |
| High Bridge | 53 | 15 | 12 | 12 |
| Easton | 74 | 15 | 12 | 12 |
| Mauch Chunk | 119 | 21 | 17 | 16 |
| Totals | 9664 | 1403 | 1161 | 1129½ |
| Average per mile | | .14517 | .12013 | .1168 |

## Table No. 2.

Showing rates out of Cincinnati to points named, on less than car loads. Compilation made from Procter & Gamble plat put in evidence before Commission. (See R. 742.)

| CINCINNATI TO | Miles | RATES 3d Class | 3d Class less 20 per cent. | 4th Class |
|---|---|---|---|---|
| Batavia | 25 | 10 | 10 | 10 |
| So. Fincastle | 53 | 17 | 14 | 14 |
| Peebles | 72 | 22 | 18 | 16 |
| Portsmouth | 105 | 14 | 12 | 12 |
| Leesburg | 64 | 13 | 10 | 10 |
| E. Monroe | 67 | 13½ | 10½ | 10 |
| Greenfield | 74 | 15 | 12 | 10½ |
| Lyndon | 77 | 17 | 14 | 11 |
| Musselman | 87 | 17 | 14 | 12 |
| Anderson | 90 | 18 | 14 | 12 |
| Chillicothe | 87 | 19 | 15 | 12½ |
| Ray | 117 | 19½ | 15½ | 12½ |
| McArthur Jct. | 134 | 20 | 15½ | 13 |
| Athens | 158 | 21 | 17 | 13½ |
| Parkersburg | 195 | 22½ | 18 | 15 |
| Leesville | 61 | 13 | 10 | 10 |
| Sabina | 69 | 13½ | 10½ | 10½ |
| Washington C. H. | 73 | 17 | 14 | 11 |
| Bloomingsburg | 78 | 19½ | 15½ | 12½ |
| Summit | 129 | 20 | 16 | 13 |
| Kirkersville | 137 | 20 | 16 | 13½ |
| Newark | 149 | 21 | 17 | 13½ |
| Black Hand | 159 | 21½ | 17½ | 14 |
| Sonora | 182 | 22½ | 18 | 15 |
| Campbell's | 210 | 25 | 20 | 17 |
| Wheeling | 258 | 25 | 20 | 17 |
| Xenia | 65 | 12 | 10 | 10 |
| Wilberforce | 69 | 13½ | 10½ | 10 |
| Cedarville | 73 | 15 | 12 | 10½ |

| CINCINNATI TO | Miles | RATES 3d Class | 3d Class less 20 per cent. | 4th Class |
|---|---|---|---|---|
| Selma | 79 | 17 | 14 | 11 |
| Lilly Chapel | 109 | 19½ | 15½ | 12½ |
| Hanover | 161 | 21½ | 17½ | 14 |
| Conesville | 183 | 22 | 18 | 14½ |
| Newcomerstown | 203 | 22½ | 18 | 15 |
| Philadelphia Road | 224 | 23 | 18 | 15½ |
| Canotten | 232 | 23½ | 18 | 16 |
| Bloomfield | 252 | 24½ | 19½ | 16½ |
| Colliers | 277 | 25 | 20 | 17 |
| Oakdale | 298 | 25 | 20 | 17 |
| Carnegie | 305 | 26 | 21 | 18 |
| Pittsburgh | 318 | 26 | 21 | 18 |
| Dayton | 59 | 10½ | 8½ | 8½ |
| Harshman | 61 | 13½ | 10½ | 10 |
| Cold Springs | 76 | 17 | 14 | 11 |
| Plattsburg | 91 | 18 | 14 | 12 |
| London | 95 | 18 | 14 | 12 |
| Glade Run | 100 | 19 | 15 | 12½ |
| Leonardsburg | 155 | 21 | 17 | 13½ |
| St. James | 178 | 21½ | 17½ | 14 |
| Greenwich | 208 | 22 | 18 | 14½ |
| New London | 216 | 22 | 18 | 15 |
| North Eaton | 249 | 23 | 18 | 16 |
| Cleveland | 263 | 23½ | 18½ | 16 |
| Nottingham | 272 | 25 | 20 | 17 |
| Ashtabula | 312 | 25 | 20 | 17 |
| Johnson's | 67 | 15 | 13 | 11½ |
| Tippecanoe | 74 | 17 | 14 | 11½ |
| Kirkwood | 94 | 19 | 15 | 12½ |
| Botkins | 112 | 20 | 16 | 13 |
| Ottawa | 151 | 21½ | 17½ | 14 |
| Custar | 172 | 22½ | 18 | 15 |
| Wagon Works | 207 | 24½ | 19½ | 16½ |
| Detroit | 262 | 24½ | 19½ | 16½ |

| CINCINNATI TO | Miles | RATES 3d Class | 3d Class less 20 per cent. | 4th Class |
|---|---|---|---|---|
| Eaton | 58 | 12 | 10 | 10 |
| New Hope | 63 | 12 | 10 | 10 |
| Fountain City | 83 | 19½ | 15½ | 12½ |
| Ridgeville | 107 | 20 | 16 | 13½ |
| Briant | 124 | 22 | 18 | 14½ |
| Williams | 151 | 22½ | 18 | 15 |
| Huntertown | 178 | 23 | 18 | 16 |
| Rome City | 201 | 24½ | 19½ | 16½ |
| Kalamazoo | 258 | 25 | 20 | 17 |
| Plainwell | 271 | 27½ | 22½ | 19 |
| Grand Rapids | 308 | 27½ | 22½ | 19 |
| Brownsville | 59 | 12 | 10 | 10 |
| Lyons | 63 | 15 | 12 | 10½ |
| Brandon | 90 | 19½ | 15½ | 12½ |
| Broad Ripple | 126 | 22 | 18 | 14½ |
| Monticello | 209 | 22½ | 18 | 15 |
| Guernsey | 214 | 23 | 18 | 16 |
| Rennsellaer | 235 | 25 | 20 | 17 |
| Chicago | 305 | 25 | 20 | 17 |
| Guilford | 41 | 15 | 12 | 10½ |
| Adams | 69 | 18 | 14 | 12 |
| Fairland | 91 | 19½ | 15½ | 12½ |
| Moorfield | 112 | 22 | 18 | 14½ |
| Hilliary | 200 | 25 | 20 | 17 |
| Peoria | 321 | 25 | 20 | 17 |
| Terre Haute | 183 | 22 | 18 | 14½ |
| Paris | 202 | 22½ | 18 | 15 |
| Pana | 245 | 25 | 20 | 17 |
| St. Louis | 342 | 25 | 20 | 17 |
| Martinsville | 141 | 21½ | 17½ | 14 |
| Worthington | 182 | 22 | 18 | 14½ |
| Aurora | 30 | 9 | 8 | 8 |
| Nebraska | 63 | 13 | 10 | 10 |
| North Vernon | 73 | 15 | 12 | 10½ |

| CINCINNATI TO | Miles | RATES 3d Class | 3d Class less 20 per cent. | 4th Class |
|---|---|---|---|---|
| Brownstown | 98 | 19 | 15 | 12½ |
| Riverdale | 131 | 19½ | 15½ | 13 |
| Georgia | 134 | 22 | 18 | 14½ |
| Hyatts | 180 | 22½ | 18 | 15 |
| Vincennes | 192 | 22½ | 18 | 15 |
| Lawrenceville | 198 | 23 | 18 | 15½ |
| Bridgeport | 260 | 23½ | 18½ | 16 |
| Xenia | 253 | 25 | 20 | 17 |
| Totals | 16076 | 2111½ | 1696 | 1444½ |
| Average per mile | | .1313 | .1054 | .0898 |

**Recapitulation—Comparison.**

| | RATES 3d Class | 3d Class less 20 per cent. | 4th Class |
|---|---|---|---|
| Rate per Mile Out of New York City | .14517 | .12013 | .1168 |
| Rate per Mile Out of Cincinnati | .1313 | .1054 | .0898 |
| Excess N. Y. over Cincinnati | .01387 | .01473 | .0270 |

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